In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1214

MILTON SILVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this collateral proceeding under 28 U.S.C. 2255, petitioner claims that he was prejudiced by a variance between the indictment and the government's proof at trial.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on sixteen counts (counts one through fifteen and count eighteen) of an eighteen-count indictment charging embezzlement from, and falsification of records and reports of, certain labor unions (of which he was an officer). Counts one through thirteen charged embezzlement and conversion of funds of two local unions, in violation of 29 U.S.C. 501(c); count fourteen charged embezzlement of money of an employee welfare benefit plan of another local union, in violation of 18 U.S.C. 664; count fifteen charged false reporting on

a Labor-Management Report, in violation of 29 U.S.C. 439(b); and count eighteen charged that petitioner caused false entries to be made in the books and records of the two local unions, in violation of 29 U.S.C. 439(c). Petitioner was sentenced to concurrent four-month prison terms on counts one through fifteen, and to a consecutive four-month term on count eighteen; he was also fined $1,000 on each count. The court of appeals affirmed the conviction as to counts nine through fifteen and count eighteen, but reversed the conviction on counts one through eight. 430 F. 2d 106. This Court denied certiorari. 402 U.S. 953.

Petitioner then instituted the current proceeding under 28 U.S.C. 2255, claiming that the introduction of evidence showing that the minutes of a 1965 union executive board meeting had been falsely altered in March 1967 constituted an illegal amendment of count eighteen of the indictment, which charged the making of false entries "[f]rom on or about the 1st day of January, 1965 to on or about the 31st day of December 1966." Whether this kind of claim, not raised on direct appeal, can be raised collaterally under Section 2255 is highly doubtful, but in any event, the claim was throughly considered and properly rejected by the district court in an opinion on which we rely (Pet. App. 2a-7a). The court of appeals affirmed *per curiam* (Pet. Spp. 1a.

We further note that count eighteen was proven at trial by two other instances of petitioner's false reporting, both of which occurred within the period specified in the indictment. See 430 F. 2d at 120. Moreover, unlike *United States* v. *Critchley*, 353 F. 2d 358 (C.A. 3), cited by petitioner, where the grand jury specifically confined its charges to two particular days, the grand jury in this case,

in describing the period of the offense, used the phrase "from on or about" the period in question to allege approximately when the alterations took place.

Petitioner also claims that the evidence of the retyped union minutes, together with the evidence presented on the eight embezzlement counts on which his conviction was reversed by the court of appeals on direct appeal, unfairly prejudiced his trial. But as the district court correctly held, the evidence of the retyped union minutes was properly admitted into evidence. Moreover, that evidence and the evidence offered on counts one through eight was relevant to show petitioner's intent to commit the other embezzlement violations. See 430 F. 2d at 123-124 and Pet. App. 6a, 9a-10a.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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